Office - Supreme Court, U.S.
FILED
SEP 27 1984
ALEXANDER L. STEVAS
CLERK

No. 84-302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

AND

THE UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN DOAR,
233 Broadway,
11th Floor,
New York, NY 10279,
(212) 619-3730,
Attorney for Investigating Committee of the Judicial Council of the Eleventh Circuit,
Counsel of Record.

Of Counsel:
G. STEWART WEBB, JR.,
1800 Mercantile Bank and Trust Bldg.,
2 Hopkins Plaza,
Baltimore, MD 21201,
(301) 244-7400.

The Daily Record Co., Baltimore, MD 21202

BEST AVAILABLE COPY

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 735 F.2d (No. 2) 1261.

QUESTIONS PRESENTED

The questions presented for review as formulated by Petitioner do not comply with the requirements of Rule 21.1(a) of the Rules of the Supreme Court. Petitioner's four questions are improperly argumentative, and Question 2, which asserts misuse of the grand jury, and Question 3, which challenges an Act of Congress, are not

fairly raised by the record. Respondent respectfully submits that the record below raises only a single question that is very narrow in scope. That question may be stated as follows:

1. Whether the District Court possessed the authority to grant the petition of a special committee, composed of Article III Judges and convened pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 to investigate and report on a complaint filed thereunder against a United States District Judge, for limited access to the records and evidence before a grand jury, now discharged, that returned an indictment against the Judge under investigation.

The foregoing question includes the following subsidiary question: (a) Whether the District Court abused its discretion in exercising its authority and permitting the special committee restricted access to the requested grand jury materials.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
(a) Statement of Facts. . .	7
(b) Opinion of the District Court	10
(c) Opinion of the Court of Appeals . .	13
REASONS FOR DENYING THE WRIT. .	19
1. The decisions of the District Court and the Court of Appeals, granting the Investigating Committee restricted access to grand jury materials, are consistent with the prior decisions of this Court and not in conflict with the decision of any other federal court of appeals.	19
2. Question 2 and Reason 1(b), which assert grand jury abuse, are not fairly raised by the record. The Court of Appeals did not construe the Act to facilitate the Justice Department's improper use of the grand jury to assist the judicial councils, and there is no evidence or claim of grand jury abuse in this case	35

Page

3. Question 3 and Reason 2, which challenge the constitutionality of the Act, are not fairly raised by the record. Judge Hastings repeatedly advised the courts below that the constitutionality of the Act was not at issue in this case, and the lower courts did not decide that question. 40

4. Reason 3 has no validity. Once the Rule of Necessity is found to apply, the decision of the Court of Appeals is entitled to the same weight and respect as any other decision 43

CONCLUSION 48

TABLE OF AUTHORITIES

Cases	Page
Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) .	20,26,30-31,32,39
Hastings v. Judicial Conference of the United States, Civil No.83-3850 (D.D.C. July 25, 1984),appeal pending, No. 84-5576 (D.C. Cir.) . . .	42
Illinois v. Abbott & Associates, Inc. 103 S. Ct. 1356 (1983). .	20,26,34
In re Biaggi, 478 F.2d 489 (2d Cir. 1973)	25
In re Report & Recommendations of June 5, 1972 Grand Jury, 370 F. Supp. 1219 (D.D.C.),mandamus denied sub nom.Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974) . .	24-25
Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959)	22-23
United States v. Baggot, 103 S. Ct. 3164 (1983)	20,27
United States v. Borders, 633 F.2d 1318 (11th Cir 1982), cert. denied, 103 S. Ct. 1875 (1983)	7

Page

United States v. Procter & Gamble Co.,356 U.S. 677 (1958) 12,20,33

United States v. Rose, 215 F.2d 617 (3d Cir. 1954) . . . 32

United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983) 20,27,32, 33

United States v. Will, 449 U.S.200 (1980) 44-45,47

Statutes and Rules

Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§331, 332, 372(c), 604 (1982) . . passim

28 U.S.C. §372(c)(5) 10,15,16, 17,29,35

28 U.S.C. §373(c)(10) 40

28 U.S.C. §372(c)(14) 3

Rule 21, Rules of the Supreme Court i

Rule 6(e), Federal Rules of Criminal Procedure 11-12,14-15,17-28

Page

Rule for the Conduct of Complaint Proceedings under 28 U.S.C. §373(c), as promulgated by the Judicial Court of the Eleventh Circuit. 8

Other Authority

H.R. Rep. No. 1313, 96th Cong., 2d Sess. (1980) 16

Notes of Advisory Committee on Rules following Fed. R. Crim. P. 6 23

No. 84-302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

AND

THE UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Investigating Committee of the Judicial Council of the Eleventh Circuit ("the Committee") initiated this proceeding below as part of its investigation into the facts and allegations of a complaint filed against Petitioner, United States District Judge Alcee L. Hastings, under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("the Act"), Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§331, 332, 372(c), 604 (1982). On June 3, 1983, the Commttee petitioned the United States District Court for the Southern District of Florida for limited access to certain grand jury materials under the control of that court (App. 110-16).

The lower courts have supported the Committee's request for access to the grand jury materials. On December 20, 1983, the District Court (per Gordon, J., by designation)[1/] entered a Memorandum Opinion, reported at 576 F. Supp. 1275 (App. 59-98), granting the Committee's petition and allowing restricted access to the grand jury materials. Although Judge Gordon recognized that the Committee sought only access to the materials for use in connection with proceedings that

---

1/ All of the regular judges of the Southern District of Florida recused themselves from consideration of the Committee's petition. The Chief Justice thereafter specially designated the Honorable Eugene A. Gordon, Senior Judge of the United States District Court for the Middle District of North Carolina, to sit as a judge of the Southern District of Florida for the purposes of this case.

are confidential under the Act,[2/] he took the added step of imposing "stringent 'protective limitations on the use of the disclosed material' to further ensure confidentiality." (App. 87). Those protective limitations are set forth in a separate Order filed on December 20, 1983 (App. 99-105). The Order expressly restricted access to the five judges who constitute the Committee, its two counsel and a secretary who must execute a written oath of confidentiality before an Article III Judge (App.

[2/] The Act expressly provides for confidentiality. Under Section 372(c)(14), "[a]ll papers, documents, and records of proceedings related to investigations . . . shall be confidential and shall not be disclosed by any person" except under certain narrow circumstances set forth in the statute. 28 U.S.C. §372(c)(14)(1982).

100-01). Judge Gordon futher directed that the inspection of the grand jury materials was to take place in the office of the United States Attorney for the Southern District of Florida or at some other place mutually agreeable to the Committee and the United States Attorney in the Courthouse, and he made the United States Attorney responsible "for implementing the provisions of this Order and...for preserving the secrecy of the Grand Jury Records." (App. 101) The Order also placed restrictions on copying the materials (App. 104).

Judge Hastings timely noticed an appeal to the United States Court of Appeals for the Eleventh Circuit. The regular judges of the Eleventh Circuit recused themselves, and the Chief Justice designated a special panel to

hear the appeal.[3] On June 20, 1984, the Court of Appeals issued a unanimous opinion, authored by Judge Campbell (App. 1-58), affirming "the restricted access granted by the district court" (App. 57).

The Committee has not yet been allowed to inspect the grand jury materials. On February 3, 1984, the Court of Appeals stayed the District Court's Order of December 20, 1983 and expedited the appeal. In its opinion of June 30, 1984, the Court of Appeals

---

[3] The panel was composed of the Honorable Levine H. Campbell, Chief Judge of the United States Court of Appeals for the First Circuit, the Honorable Wilbur F. Pell, Circuit Judge of the United States Court of Appeals for the Seventh Circuit, and the Honorable Amalya Lyle Kearse, Circuit Judge of the United States Court of Appeals for the Second Circuit.

directed that the stay shall be lifted upon issuance of the mandate (App. 57). Judge Hastings thereafter sought a stay of the mandate pending applicaton to the Supreme Court for a writ of certiorari. On August 13, 1984, Judge Campbell entered an order staying the issuance of the mandate until August 27, 1984 with the stay to continue in force until final dispostition of the case by the Supreme Court upon a timely filing of a petition for writ of certiorari (App. 108-09). After Judge Hastings filed his Petition, the Committee applied for an order vacating the stay. Justice Powell denied the Committee's application on September 7, 1984. The stay of the District Court's Order, therefore, remains in effect.

(a) Statement of Facts

On December 29, 1981, Grand Jury 81-1 of the Southern District of Florida returned an indictment charging Judge Hastings and William A. Borders, Jr., an attorney, with conspiring to solicit and accept a bribe in exchange for influencing the outcome of a criminal case pending before Judge Hastings (App. 112). The trial of Borders was severed and transferred to the Northern District of Georgia. On May 7, 1982, Borders was convicted after trial by jury, and the Eleventh Circuit subsequently affirmed that conviction. United States v. Borders, 633 F.2d 1318 (11th Cir. 1982), cert. denied, 103 S. Ct. 1875 (1983). On January 19, 1983, the trial of Judge Hastings commenced before a jury in

the Southern District of Florida. On February 4, 1983, the jury returned a verdict of not guilty on both counts of the indictment.

On March 17, 1983, Wm. Terrell Hodges, Chief Judge of the Middle District of Florida, and Anthony A. Alaimo, Chief Judge of the Southern District of Georgia, filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit a verified written complaint against Judge Hastings under the Act and the Rule for the Conduct of Complaint Proceedings under 28 U.S.C. §372(c), as promulgated by the Judicial Council of the Eleventh Circuit. The complaint, which was later made a part of the public record by Judge Hastings, contains six counts alleging that Judge Hastings has engaged in conduct

prejudical to the effective and expeditious administration of the business of the courts. The first count of the complaint is based on the same allegations as the criminal indictment.

On March 29, 1983, the Honorable John C. Godbold, Chief Judge of the United States Court of Appeals for the Eleventh Circuit, entered an order appointing a special committee - the Respondent Investigating Committee - to investigate the facts and allegations of the complaint. The members of the Committee are Chief Judge Godbold, Circuit Judge Gerald B. Tjoflat, Circuit Judge Frank M. Johnson, Jr., District Judge Sam C. Pointer and District Judge William C. O'Kelley. This Commitee is statutorily empowered and required under the Act to "conduct an investigation as

extensive as it considers necessary, and [to] expeditiously file a comprehensive written report thereon with the judicial council of the circuit." 28 U.S.C. §372(c)(5)(1982).

The Committee sought access to the grand jury materials as part of its investigation of the complaint filed against Judge Hastings. As represented in the petition filed in the District Court, the Committee has determined that in the performance of its statutory duty to make a complete and thorough investigation, it should review the record, transcript, minutes and exhibits of the proceedings of the grand jury that indicted Judge Hastings and Borders (App. 112-113).

(b) Opinion of the District Court

The Committee addressed its petition to the inherent supervisory

authority of a district court to permit disclosure of grand jury materials in extraordinary and limited circumstances. The Committee did not rely upon the specific provisions of Rule 6(e) of the Federal Rules of Criminal Procedure, although Judge Hastings argued below, as he must now, that Rule 6(e) provides the exclusive framework for disclosure of grand jury materials.

The District Court ordered disclosure to the Committee pursuant to its general supervisory authority over grand jury proceedings and records. It was "not persuaded that a Committee composed of Article III judges, acting as an arm of the judiciary and in furtherance of a Congressional mandate, has no autnority other than that given by Rule 6(e) to review grand jury

material." (App. 75-76). That Rule, the District Court concluded, "is not the sole repository of the district court's authority to grant access to grand jury records.... The inherent power of the supervising court will be affirmatively exercised only if the recognized need for the material outweighs the traditional considerations justifying secrecy." (App. 76-77). The unusual circumstances of the Committee's petition thus required the District Court "to balance the need for effective administration of the Congressionally established procedure for judicial self-discipline against the traditional factors favoring the '"indispensable secrecy of [the] grand jury proceedings."'" (App. 77, quoting from United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958)).

The District Court struck the balance in favor of disclosure: "[T]he substantial interest in judicial accountabilty, integrity, and independence - safeguarded by the Act's self-discipline mechanism - significantly outweighs the lesser public interest in precluding the narrowly circumscribed, non-public disclosure sought by the Committee for its limited statutory purpose." (App. 98).

(c) Opinion of the Court of Appeals

The Court of Appeals "support[ed the District Court's] analysis in the special circumstances of a judicial investigation under section 372(c)" of the Act (App. 21). Its opinion makes clear that this case differs markedly from "'garden variety' petitions for grand jury disclosure" and that

"courts are not empowered to act outside Rule 6(e) in other than exceptional circumstances consonant with the rule's policy and spirit." (App. 28) But, a thorough review of the case law and the history of Rule 6(e) lead the Court of Appeals to conclude that "[t]he district court's belief that it had inherent power beyond the literal wording of Rule 6(e) is amply supported." (App. 22).

Having approved the inherent authority for disclosure, the Court of Appeals next considered the exercise of that authority. It concluded that "a petition by a judicial investigating committee presents one of the occasions when a district court may act outside the strict bounds of Rule 6(e), in reliance upon its historic supervisory power." (App. 42). The

Court of Appeals supported this conclusion developing "the unique character of the Committee, the scope of its investigative powers, and the importance of its mission" (App. 22), and by exploring "the close correspondence between the present situation and the express exception to grand jury secrecy allowed in Fed. R. Crim. P. 6(e)(3)(C)(i)." (App. 37).

The Court of Appeals placed great weight on the Congressional mandate behind the Committee's petition:

> We think it highly significant that the grand jury materials in question were sought by an investigating committee acting pursuant to express statutory authority to 'conduct an investigation as extensive as it considers necessary....' 28 U.S.C. §372(c)(5) (emphasis added). There is every indication that Congress meant this open-ended grant to be read just as broadly as it is written. The House Report on

the Act states that 'Paragraph (c)(5) provides the special committee with broad flexibilty and general authority to investigate the facts and allegations contained in the complaint.' H.R. Rep. No. 1313, 96th Cong., 2d Sess. 11 (1980) (emphasis added). And the unique composition of an investigating committee makes such an extensive delegation reasonable. The federal judges who compose it are sheltered by Article III, and must as an obligation of their office conduct an unbiased, objective inquiry. They are suited by experience and professional training to determine what evidence needs to be examined, and to deal discreetly with all types of evidence, including confidential materials like those here in issue.

Moreover, the question under investigation -- whether an Article III judge should be recommended for impeachment by the Congress, otherwise disciplined, or granted a clean bill of heath -- is a matter of great societal importance. Given the character of an investigating committee and what is at stake -- the public confidence in the judiciary, the independence and reputation

> of the accused judge -- paragraph (c)(5) must in our view be read, with very few strings, as conferring authority to look into whatever is material to a determination of the truth or falsity of the charges.

(App. 29-31) (footnote omitted).

The "closely analogous" circumstances between the Committee's petition and the provisions of Rule 6(e)(3)(C)(i) for disclosure (App. 21-22) provided a "further justification" in the appellate court's view "for the [district] court's invocation of its inherent power" (App. 37). Rule 6(e)(3)(C)(i) expressly permits a district court to order disclosure of grand jury materials "preliminary to or in connection with a judicial proceeding." The Court of Appeals acknowledged that "the circuit council and Judicial Conference proceedings

[under the Act] to which an investigating committee's investigation is ancillary are not proceedings before any identifiable court, and for this reason, may not be a 'judicial proceeding' within the precise language of the exception." (App. 37). But a review of the role and procedures of the judicial council in a proceeding under the Act convinced the Court of Appeals that "a council's review is little removed from the judicial proceedings encompassed within the Rule 6(e)(3)(C)(i) exception, whether or not it is a judicial proceeding in the strict legal sense." (App. 41). Accordingly the Court of Appeals concluded that "[d]isclosure to an investigating committee is ... closely

akin to a Rule 6(e)(3)(C)(i) disclosure 'preliminary to...a judicial proceeding.'" (App. 41).

REASONS FOR DENYING THE WRIT

1. The decisions of the District Court and the Court of Appeals, granting the Investigating Committee restricted access to grand jury materials, are consistent with the prior decisions of this Court and not in conflict with the decision of any other federal court of appeals.

The first reason advanced in the Petition for granting review is essentially an argument that the lower courts wrongly decided the case. Judge Hastings is unable to point to any conflict among the Circuits on the issue of disclosure of grand jury materials to a special investigating committee under the Act because no other federal court of appeals has yet to consider the issue. He, instead, attempts to create a conflict between

the decision of the Court of Appeals and "specific principles articulated" (Pet. at 25) by this Court in five decisions on disclosure of grand jury materials.[4/] The five decisions cited by Judge Hastings address entirely different circumstances and concerns than those presented by the Committee's petition. Each of those cases arose under the provisions of Rule 6(e) for disclosure; and none involved, much less required this Court to consider, the inherent supervisory authority of a district court

---

[4/] The five decisions are United States v. Baggot, 103 S. Ct. 3164 (1983), United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1984), Illinois v. Abbott & Associates, Inc., 103 S. Ct. 1356 (1983), Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), and United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

to permit restricted access to grand jury materials under circumstances at all similar to this case.

Nor does the decision of the Court of Appeals represent "a dramatic departure from...decisional jurisprudence" as Judge Hastings argues (Pet. at 20). To the contrary, the Court of Appeals drew from existing authority to craft an opinion fully consistent with that authority. Although approving disclosure outside the strict bounds of Rule 6(e), the Court of Appeals still considered the requirements of the Rule and reasoned that "[p]ermitting...a [judicial investigating] committee to have access to grand jury materials in proper circumstances would be consistent with the policy and spirit of Rule 6(e)." (App. 42). The Court of Appeals then

applied established principles in concluding that the District Court had exercised its authority in "proper circumstances" and "with due regard to the standards for disclosure enunciated by the Supreme Court." (App. 42-43).

Reason 1 in the Petition rests on the unstated proposition that Rule 6(e) provides the exclusive means for disclosure of grand jury materials. The Court of Appeals held otherwise, concluding that the existence of a district court's inherent supervisory authority to allow disclosure under exceptional circumstances "is amply supported." (App. 22). The Court of Appeals was correct in this conclusion.

In Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959), this Court noted that Rule

6(e) "is but declaratory of" the principle "regarding disclosure as committed to the discretion of the trial judge." See also Notes of Advisory Committee on Rules following Fed. R. Crim. P. 6. The Court of Appeals read this pronouncement on Rule 6(e) as meaning "that the rule is not the true source of the district court's power with respect to grand jury records but rather is a codification of standards pertaining to the scope of the power entrusted to the discretion of the district court." (App. 23).

The Court of Appeals found further support for the existence of inherent authority in the history of Rule 6(e). It viewed that history as "offer[ing] an interesting picture of how courts' 'inherent power' has shaped the rule" (App. 24), and it

pointed to several instances where the Rule had been amended to reflect prior judicial decisions allowing disclosure under circumstances not specifically enumerated in the Rule (App. 25-26). From this history, the Court of Appeals concluded "that the exceptions [in Rule 6(e)] permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts in conformance with the rule's general rule of secrecy." (App. 26-27).

Other federal courts have also held that Rule 6(e) is not the sole repository of a district court's authority to grant access to grand jury materials. The leading decision is In re Report & Recommendations of June 5, 1972 Grand Jury, 370 F. Supp. 1219 (D.D.C.), mandamus denied sub

nom. Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974), where Judge Sirica invoked this inherent authority to order that certain grand jury materials be turned over to the Committee on the Judiciary of the House of Representatives for use in the impeachment inquiry into the conduct of former President Nixon. Upon an extended analysis of the historic function of the grand jury, Judge Sirica concluded: "Rule 6(e) which was not intended to create new law, remains subject to the law or traditional policies that give it birth." 370 F. Supp. at 1229. See also In re Biaggi, 478 F.2d 489 (2d Cir. 1973).

The analysis of the Court of Appeals in recognizing the existence of inherent authority does not conflict with the five decisions of this

Court cited by Judge Hastings. This Committee is not a private litigant seeking access to grand jury materials for use in private litigation as in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), where the Court was concerned with ensuring that the appropriate district court pass on the need for the material. The Committee is not a state attorney general or other law enforcement agency seeking to investigate possible violations of the antitrust laws as in Illinois v. Abbott & Associates, Inc., 103 S. Ct. 1356 (1983). There, the Court was reluctant to read into Rule 6(e) an exception when Congress had, the Court believed, not expressly provided that the State Attorneys' General were automatically entitled to obtain grand jury materials. It is

not the Department of Justice or the Internal Revenue Service seeking to develop information about possible civil tax liability by utilizing the fruits of a grand jury investigation as in United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983), and United States v. Baggot, 103 S. Ct. 3164 (1983). In those situations, the Court was concerned about the possibility of undetected abuse and was firm in requiring the agencies to demonstrate to a court why and in what connection it was necessary to obtain the material.[5/]

[5/] In Baggot, this Court discussed the requirement of a "judicial proceeding" for disclosure under Rule 6(e)(3)(C)(i). The Court of Appeals found that the review under the Act by the Judicial Council of the Committee's work

(Footnote continued)

This Committee is a body of federal judges appointed pursuant to a congressionally established procedure for investigating and reporting on allegations of conduct by a federal judge prejudicial to the effective and expeditious administration of the business of the courts. It does not possess the investigatory resources of a state attorney general's office or an administrative agency or the

---

(Footnote continued)

involves a "judicial inquiry" and "is little removed from the judicial proceedings encompassed within the Rule 6(e)(3)(C)(i) exception" (App. 41). See pages 17-19 supra. In recognizing the inherent authority of the district court, the Court of Appeals was hardly trying, as Judge Hastings now argues, "to avoid the 'judicial proceeding' requirement of Rule 6(e)(3)(C)(i)." (Pet. at 29).

Department of Justice; but the work of the Committee involves a matter of the utmost importance -- the integrity of the federal judicial system. The surest way to protect that integrity is for the Committee to get to the bottom of the allegations against Judge Hastings one way or the other. To this end, Congress has conferred upon the Committee the statutory authority to "conduct an investigation as extensive as it considers necessary." 28 U.S.C. §372(c)(5) (1982). The Court of Appeals properly recognized and considered the membership of the Committee and the importance of its work (App. 29-31).

The Court of Appeals did not, however, simply rest its decision on these distinctions. Nor did it sanction the type of automatic disclosure

sought but rejected in Illinois v. Abbott & Associates, Inc., supra. Rather, the Court of Appeals specifically examined the District Court's disclosure order under "the standards for disclosure enunciated by the Supreme Court." (App. 43). Those standards as identified and applied by the Court of Appeals are the very ones set forth in the decisions cited by Judge Hastings. Although those decisions do not address the issue of inherent authority, they do provide standards for deciding when disclosure is appropriate once the authority has been established, and the Court of Appeals carefully followed those standards (App. 42-56). In particular, the Court of Appeals applied the balancing test set forth in Douglas Oil Co. v Petrol Stops Northwest, supra, 441

U.S. at 223: "disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy...." (App. 43-44). True to this test, the Court of Appeals examined the Committee's need for the grand jury records (App. 45-49) and the secrecy interest (App. 50-53). It then struck the balance in favor of disclosure (App. 53-56).

On the issue of need, the Court of Appeals focused on the mission of the Committee:

> A thorough investigation is essential not only to ensure the integrity of federal judges, but also to instill public confidence in the judiciary.... The Committee must be able to represent to the [Judicial] Council, and the Council must be satisfied, that all available evidence of possible materiality has been sifted: for the Committee to examine matters extensively and find nothing may be as much a part of its duty as to

> look at evidence whose incriminating nature is known in advance. The object of the investigation is not to prove a case against the judge but to determine whether there is or is not a case.

(App. 45-46). Based on this mission and the "special responsibilties" of the Committee, the Court of Appeals "believe[ed] the Committee satisfied the 'particularized need' standard by demonstrating a close nexus between the subject of the grand jury proceeding and the complaint under investigation." (App. 49). The flexible standard of need as articulated by this Court in Douglas Oil and in United States v. Sells Engineering, Inc., supra, requires no more.

The Court of Appeals evaluated the secrecy interest in light of the factors identified in United States v. Rose, 215 F.2d 617, 628-29 (3d Cir.

1954), and adopted by this Court in United States v. Procter & Gamble Co., supra, 356 U.S. at 681-82 n.6 (App. 50). Under those factors, the Court of Appeals found a "'reduced' interest in secrecy" that "is further diminished in this case when the identity of the party requesting access is considered." (App. 51-52). Such a consideration was expressly approved in United States v. Sells Engineering, Inc., supra, 103 S. Ct. at 3149, where this Court noted "a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public." Granting access to a special committee of federal judges,

under a statute that mandates confidentiality, poses even less of a risk of any improper disclosure.

In weighing these competing concerns, the Court of Appeals found, as the District Court had, "that the Committee's need for the records outweighs the public interest in secrecy." (App. 53). As an additional factor favoring disclosure, the Court of Appeals also noted "the important 'public interest in the integrity and independence of the judiciary'" (App. 53). This Court has recognized that "the district court may weigh the public interest, if any, served by disclosure to a governmental body...." Illinois v. Abbott & Associates, Inc., supra, 103 S. Ct. at 1362 n.15.

In sum, the decision of the Court of Appeals rests on established judicial principles. The Court of Appeals

recognized the standards set by this Court for disclosure of grand jury materials and carefully applied those standards to the unique circumstances of this case. Its decision is not in conflict with the decisions of this Court, and, as previously noted, no other federal court has addressed the issue of disclosure to a special investigating committee created under the Act to "conduct an investigation as extensive as it considers necessary." 28 U.S.C. §372(C)(5)(1982).

2. Question 2 and Reason 1(b), which assert grand jury abuse, are not fairly raised by the record. The Court of Appeals did not construe the Act to facilitate the Justice Department's improper use of the grand jury to assist the judicial councils, and there is no evidence or claim of grand jury abuse in this case.

In Question 2 and Reason 1(b) of the Petition for Writ of Certiorari,

Judge Hastings argues that the decision of the Court of Appeals will encourage prosecutors to misuse the grand jury to gather information against federal judges for use by judicial councils under the Act. He also claims that the Committee's investigation is in furtherance of an unconstitutional conspiracy against him.[6/]

The issue concerning misuse of the grand jury was neither raised nor decided below.[7/] Contrary to Judge

---

[6/] This second claim apparently relates to Question 4 in the Petition for Writ of Certiorari. That question does not present a substantial issue for review by this Court.

[7/] This argument by Judge Hastings is based on a policy argument advanced by the Department of Justice in the Court of Appeals.

(Footnote continued)

Hastings' assertion, the Court of Appeals did not construe the Act to facilitate any improper use by the Justice Department to assist the judicial councils in conducting a proceeding under the Act. The Court of Appeals construed the Act as follows: "We infer not only from the Act's broad language but from its purpose a clear congressional intent that grand jury materials be among those available to a [special investigating]

(Footnote continued)

The Department noted that a grand jury investigation might on occasion develop evidence of possible misconduct by a federal judge for which indictment might not be appropriate. The Department urged that it be allowed to disclose such evidence to a judicial council. The Court of Appeals did not adopt or refer to this policy argument in its opinion.

committee in appropriate circumstances." (App. 36). The circumstances before the Court of Appeals involved grand jury materials already in existence, and no argument was even made that the prosecutors had improperly used this grand jury to gather information against Judge Hastings for use by the Committee or the Judicial Council of the Eleventh Circuit. Indeed, the fact that the grand jury investigation resulted in the indictment of two persons and the conviction of one clearly negates any suggestion that this grand jury was being used to assist the Committee. Abuse of the grand jury was simply not a factor presented to the lower courts. Reason 1(b) builds on nothing more than speculation and does not afford a basis for review by the Court of the decision below.

Judge Hastings' additional claim of an unconstitutional conspiracy was properly rejected by the Court of Appeals. That claim, which the Committee unequivocally denies, has no bearing on the disclosure issues presented to the District Court by the Committee's petition. The District Court sat as the court that had supervised the grand jury whose records were being sought. It did not sit to review the decisions or actions of the Committee or the Judicial Council of the Eleventh Circuit. Cf. Douglas Oil Co. v. Petrol Stops Northwest, supra, 411 U.S. at 224-31 (discussing the role of the supervising court). The Act precludes such review by a district court and provides that a judge aggrieved by any action of a judicial council may petition the Judicial

Conference of the United States for review of that action. 28 U.S.C. §372(c)(10)(1982). The Court of Appeals properly recognized this statutory scheme for review and ruled:

> Judge Hastings' charge that the Committee's investigation is part of a larger conspiracy is not a proper subject for consideration in this appeal. The investigation is being conducted pursuant to the Act and the district court was not the proper forum for addressing any underlying questions of constitutional abuse. Those concerns may be raised by Judge Hastings in a challenge to the actions, if any, taken by the Judicial Council.

(App. 54-55) (footnote omitted). The Court of Appeals was correct in the ruling.

3. Question 3 and Reason 2, which challenge the constitutionality of the Act, are not fairly raised by the record. Judge Hastings repeatedly advised the courts below that the constitutionality of the Act was not at issue in this case, and the lower courts did not decide that question.

In Question 3 and Reason 2 of the Petition for Writ of Certiorari, Judge

Hastings seeks to challenge the constitutionality of the Act under an allocation of powers theory. Although he adverted below to this constitutional question, he expressly withdrew the allocation of powers argument from consideration in this case. He repeatedly advised both the District Court and the Court of Appeals that he "does not suggest that these issues [as now presented in Question 3 and discussed in Reason 2] can or should be decided in these proceedings." Brief of Appellant in the Court of Appeals at 53 n.23. And, he makes the same statement to this Court in footnote 9 at page 38 of his Petition. In light of these statements, it is not surprising that the lower courts did not consider or decide questions relating to the

allocation of powers under the Act and the Constitution.

Furthermore, as noted in the Petition, Judge Hastings has filed a separate lawsuit challenging the constitutionality of the Act and presenting for decision the same arguments as are discussed in Reason 2. The suit was filed in the United States District Court for the District of Columbia on December 23, 1983 under the caption Hastings v. Judicial Conference of the United States, et al., Civil No. 83-3850. On July 25, 1984, Judge Gesell of the District Court issued a Memorandum upholding the constitutionality of the Act and expressly rejecting Judge Hastings' arguments on the allocation of powers under the Act and the Constitution. Judge Hastings noted an appeal from

this decision on August 23, 1984, and that appeal remains pending in the United States Court of Appeals for the District of Columbia.

This Court should not grant certiorari to decide the constitutionality of the Act. That issue was neither raised nor decided below.

4. Reason 3 has no validity. Once the Rule of Necessity is found to apply, the decision of the Court of Appeals is entitled to the same weight and respect as any other decision.

As his Reason 3 for granting certiorari, Judge Hastings argues that, because the Court of Appeals applied the Rule of Necessity to determine whether the panel members could decide the case, this Court should review the decision because only the members of this Court are unaffected by the operation of the Act. This argument proves too much.

If Judge Hastings were correct that review by this Court is required to assure impartiality of issues under the Act, then this Court would be compelled to pass on all issues arising under the Act, no matter how trivial or well-decided. The traditional considerations for issuing a writ of certiorari should not change merely because the lower courts applied the Rule of Necessity to determine a disqualification issue.

As the Court made clear in United States v. Will, 449 U.S. 200, 215 (1980), there is an "absolute duty of judges to hear and decide cases within their jurisdiction...." The Rule of Necessity permits a judge to fulfill that duty even where he might otherwise be disqualified because of interest if the alternative would be to

deny the litigants a forum. Id. at 217.

Judge Hastings claimed below that all district and circuit judges were disqualified from hearing this case because of interest in the outcome. He pointed to the judges' interest in the construction and implementation of the Act and argued that the Rule of Necessity did not apply. The Court of Appeals disagreed. Without deciding whether the asserted interest was truly disqualifying, the panel members of the Court of Appeals invoked the Rule of Necessity and declined to disqualify themselves (App. 17-18). Judge Hastings now concedes that the Rule of Necessity required that the panel members decide the issues presented on appeal (Pet. at 24).

Although the Court of Appeals applied the Rule of Necessity in response to Judge Hastings' argument below, the record does not clearly establish the need for that Rule. The interest of the presiding judges was indirect and remote at best. All were specially designated from outside the Eleventh Circuit, and no member of the panel is participating in any way in the proceedings involving Judge Hastings under the Act. Their interest is only in the precedential effect of this decision as members of the Judiciary who may at some future time become involved in a proceeding under the Act. Such an interest contrasts sharply with the type of direct financial interest of all federal judges that caused the Court to apply the

Rule of Necessity in United States v. Will, supra.

In all events, however, if the Rule of Necessity is to have any force, decisions rendered thereunder should be given the same weight and respect as any other decision. This is particularly true under the circumstances of this case where there is no suggestion of any actual lack of impartiality on the part of the judges below.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN DOAR
233 Broadway
11th Floor
New York, NY 10279
(212) 619-3730

Attorney for
Investigating
Committee of the
Judicial Council of
the Eleventh Circuit

Of Counsel:

G. STEWART WEBB, JR.
1800 Mercantile Bank
and Trust Bldg.
2 Hopkins Plaza
Baltimore, MD 21201
(301) 244-7400

0144Q